

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**The American Coal Company and Bill Bishop.** Case 14-CA-25400

August 1, 2002

**DECISION AND ORDER**

BY CHAIRMAN HURTGEN, AND MEMBERS LIEBMAN  
AND BARTLETT

On July 26, 2000, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The main issue presented in this proceeding is whether the judge erred in recommending dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act in June 1998 by selecting 33 employees for inclusion in a layoff of 88 hourly employees because they supported the United Mine Workers of America (the Union) during the organizing campaign conducted a few months earlier when the mine was owned by another employer. We fully agree with the judge's finding, contrary to our dissenting colleague, that the Respondent has met its burden under the *Wright Line*<sup>1</sup> test of proving its affirmative defense that it would have selected the alleged discriminatees for layoff even if they had not engaged in protected activity.

The judge found, and the record shows, that the Respondent applied neutral objective criteria in selecting employees for layoff. The selection criteria were: (1) the total number of disciplinary letters on file for each employee; (2) the average number of yearly absences from work for each employee; and (3) employee evaluations conducted by the Respondent's supervisory personnel. With respect to the evaluations, the judge found that the Respondent told its supervisors that they were *not* to consider union activity (vis-à-vis the predecessor employer) in preparing employee evaluations for use in selecting who would be laid off. Further, a large number

of supervisors testified that they were so told, and that, accordingly, they did not consider such matters. The judge, in upholding the Respondent's *Wright Line* defense, obviously credited this testimony.<sup>2</sup> Accordingly, the judge's findings that supervisors did not consider union sentiment in the evaluations they furnished, and were told not to consider union affiliation in making the evaluations, are firmly rooted in the judge's credibility determinations.<sup>3</sup>

The dissent makes no argument of any impropriety as to the Respondent's use of employees' disciplinary and attendance records in making the layoff determination. The dissent nevertheless asserts that the evaluations are "suspect" because a "small number" of evaluations noted union activity of certain employees. The written remarks cited by the dissent appear in only four evaluations by three supervisors involving only two discriminatees. There were 600 evaluations by 20 supervisors in this proceeding; the dissent does not dispute that the vast majority of these evaluations have no irregularity whatsoever and are fully consistent with the judge's *Wright Line* determination.<sup>4</sup>

Nor are there conflicts in the testimony of the Respondent's chief executive officer, Robert Murray, that call into question the judge's *Wright Line* determination. The dissent seeks to challenge the testimony of CEO Murray that he did not play a role in the selection of employees for layoff. The dissent misses the point: the issue is not whether Murray played such a role, but rather whether, if he did, he used discriminatory considerations in playing

<sup>2</sup> The dissent's contention that the judge failed to make explicit credibility determinations lacks merit. It is well established that explicit credibility findings are unnecessary when a judge has "implicitly resolved conflicts in the testimony by accepting and relying on the testimony of [one party's] witnesses." *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1330 (7th Cir. 1978).

<sup>3</sup> The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>4</sup> Moreover, the fact that a supervisor, in an isolated instance, made such a reference in his written evaluation does not itself establish that the supervisor relied upon that union activity in making a recommendation.

We note that the Respondent openly concedes that, in the aftermath of the layoffs, a number of evaluations were either discarded in the ordinary course of business or inadvertently misplaced. Given the large number of documents that the Respondent did produce at the hearing, the judge properly declined the General Counsel's request to draw an adverse inference from the Respondent's inability to locate all of the documents related to the layoffs.

<sup>1</sup> 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

such role. There is no record evidence that he did.<sup>5</sup> The dissent likewise seeks to challenge Murray's testimony that he was not the one who asked the supervisors to prepare evaluations. The critical issue is not whether Murray was the one who asked the supervisors to prepare evaluations; the critical point is that *whoever* asked for the evaluations told the supervisors not to consider union activity of employees, and the judge credited that testimony. The judge made all credibility and factual determinations necessary to support the finding that the Respondent established its *Wright Line* defense and, unlike the dissent, we would not remand this case and thereby further prolong this proceeding, the events of which took place over 4 years ago.

We further find that the judge appropriately recommended dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) of the Act when CEO Murray allegedly informed employees at January 1999 "awareness" meetings that the Respondent would not hire employees who supported the Union. The General Counsel (GC) presented four witnesses who testified that CEO Murray made such a statement at the January awareness meetings. The Respondent presented eleven employee witnesses who testified that Murray made no such statement. The Respondent also presented CEO Murray and a vice-president who testified that no such statement was made. The judge found all witnesses to be credible, i.e., no one was deliberately lying. However, the judge specifically found that the four GC witnesses were mistaken about what the CEO said. In finding no violation, the judge obviously credited the testimony of the Respondent's witnesses, including CEO Murray and the vice president, who denied that such a statement was made. The judge's dismissal of this allegation is firmly anchored in his credibility resolutions.

The dissent nevertheless seeks to remand this issue, noting that there were three "awareness" meetings (one for each shift). Three of the four GC witnesses attended one meeting, and a fourth attended another, leading the dissent to speculate that there is a "possibility" that the Respondent's eleven witnesses attended meetings other than the meetings which the four attended. We think it unnecessary and unwise to remand this case based on

<sup>5</sup> As the dissent concedes, a spreadsheet compiled by Eric Anderson and Clyde Borrell was the key document that the Respondent used in selecting employees for layoff. The dissent also concedes that the judge specifically credited the testimony of Anderson and Borrell, including their testimony that the data they entered on the spreadsheet was not tainted by any information concerning the employees' union activities or preferences. Given the judge's finding that the layoff decisions were a product of the employees' statistical ratings entered on the spreadsheet, it follows that even if Murray harbored antiunion sentiments, they played no role in the selection process.

such a theoretical possibility. In addition, CEO Murray and the vice president attended *all* of the meetings, and they denied that the statement was made.

We accordingly adopt, for all the above reasons, the judge's recommended dismissal of the complaint.

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 1, 2002

Peter J. Hurtgen, Chairman

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting

This case involves the permanent layoff of 33 pro-union mine workers in June 1998, shortly after the Respondent purchased Kerr-McGee's Galatia, Illinois coal mine, in the wake of the Union's defeat in a Board-conducted representation election. Despite the destruction and disappearance of important documents related to the layoffs, there is considerable evidence—including testimony about later statements by the Respondent's chief executive officer (CEO) that union supporters would not be hired—that the Respondent was hostile to union activity and was prepared to act on that hostility. It was undisputed, for example, that the CEO told employees that they had made the right decision in voting against union representation and that the Respondent would not have bought the mine otherwise.

The majority agrees with the judge's finding that the complaint should be dismissed, because the Respondent proved that it "applied neutral objective criteria in selecting employees for lay off." But the judge—who noted that it was clear that *some* workers would be laid off and that "life can indeed be tough"—failed to resolve important conflicts in the evidence that potentially undermine the Respondent's defense. It was the Respondent's burden, of course, to prove not simply that it used objective criteria in making layoffs, but also that those criteria (and not union activity) explain each of the 33 challenged layoff decisions individually. Given the absence of important credibility resolutions and factual findings, the Board cannot fairly make that determination. Accordingly, I would remand the case to the judge.

The exceptions filed by the General Counsel and the Charging Party raise two main issues:

(1) Did the judge err in recommending dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act in June 1988 by selecting 33 employees for layoff because they supported the United Mine Workers of America (the Union) during the organizing campaign conducted a few months earlier?

(2) Did the judge err in recommending dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) of the Act in January 1999 by informing employees that it would not hire union supporters?

As the judge correctly acknowledged, the January 1999 statements, made in “employee awareness” meetings, would throw light on the Respondent’s motivation in laying off the 33 mine workers the previous June. I thus address the evidence related to those statements first.

#### CEO Murray’s Alleged Statements during the January 1999 “Employee Awareness” Meetings

Four employee witnesses called by the General Counsel testified that Robert E. Murray, the Respondent’s chief executive officer, told employees that the Respondent would not hire workers who supported the Union.<sup>1</sup> The judge found each employee to be a credible witness. Eleven employee witnesses called by the Respondent “contradict[ed]” the four witnesses for the General Counsel.<sup>2</sup> The judge also found each of them to be a credible witness.

Unwilling to discredit any of the witnesses, the judge concluded that the General Counsel’s four witnesses must simply have been “mistaken about what Murray said.” What accounted for their mistake, the judge did not explain. Rather, focusing only on the testimony of the Respondent’s eleven witnesses, along with the testimony of CEO Murray (whose testimony in other respects was contradicted by documentary evidence and by the testimony of the Respondent’s own officials, as I will explain) and the testimony of Respondent’s vice president for human resources, Bruce Hill,<sup>3</sup> the judge held that

<sup>1</sup> Charles Jacoby testified that Murray stated that he wanted to hire young “non-union oriented” people; Jan Conci testified that Murray remarked that the Respondent needed to hire young experienced “non-union oriented employees”; Debra Mikalauskas testified that Murray stated that he wanted to hire experienced “nonunion oriented” workers; and Marty Yosanovich testified that Murray told the assembled employees that he (Murray) wanted experienced people but did not want to hire “union people.” The judge specifically found Jacoby, Conci, Mikalauskas, and Yosanovich “to be credible witnesses.”

<sup>2</sup> The eleven Respondent witnesses were Michael Jeter, Dan Inabit, Lester Burklow, David Dixon, Francis Hammer, Christopher Barter, Kenneth Hoercher, David Sneed, Dwight Jackson, Travis Tate, and Rodney Powell.

<sup>3</sup> It seems clear from the judge’s decision that despite his citation of the Murray and Hill testimony, the cumulative weight of the testimony

the General Counsel failed to prove by a preponderance of the evidence that Murray made the unlawful statement at the January 1999 awareness meetings.

In my view, the judge failed to properly reconcile this conflicting testimony. Thus, he did not consider the distinct possibility that the General Counsel’s witnesses and the Respondent’s witnesses may have attended different awareness meetings. Three separate meetings were conducted in January 1999, one for each of the three different work crews. (Tr. 1291:20–1292:6.)<sup>4</sup>

In exceptions, the General Counsel argues that because the judge credited the testimony of its four witnesses that Murray stated that he wanted to hire nonunion oriented employees, and because the Respondent failed to establish that any of its eleven witnesses attended the A-crew meeting, the judge should have treated the testimony of the General Counsel’s witnesses as unrebutted and found that the Respondent violated Section 8(a)(1) as alleged.

In its answering brief, the Respondent acknowledges that its witnesses “could not recall which shift (and consequently which awareness meeting) they were assigned to at the time.” However, the Respondent asserts that “it is reasonable to infer that between the eleven witnesses, all three January awareness meetings were covered by the testimony.”

I believe that the trier of fact should make an explicit finding whether any of the Respondent’s eleven witnesses were present at the A-crew awareness meeting attended by General Counsel witnesses Jacoby, Conci, and Mikalauskas. If none were present, then the 8(a)(1) violation should be found on the basis of the testimony of the General Counsel’s witnesses, absent some proper

of the eleven other witnesses for the Respondent was essential to his determination. The testimony of Murray and Hill, then, cannot serve as an independent basis for the judge’s finding.

In any case, the judge failed to make any clear credibility findings with respect to Murray’s testimony that “there was nothing said about unions in connection with any hiring” at the January 1999 awareness meetings. (Tr. 129: 2–3.) Similarly, the judge failed to make any clear credibility findings with respect to Vice President Hill’s testimony that at the January 1999 awareness meetings Murray did not say that he wanted “experienced non-union oriented workers.” (Tr. 1295:7–8.)

I believe that the judge should make individual credibility findings with respect to Murray and Hill. In evaluating Murray’s credibility, of course, the judge should consider the apparent discrepancies between his testimony on other, material matters and the testimony of other company officials credited by the judge.

<sup>4</sup> The record supports the General Counsel’s contention that witnesses Jacoby, Conci, and Mikalauskas all attended the same awareness meeting because they all worked on A-crew in January 1999. (Jacoby: Tr. 191:24–25 and 194:18–24; Conci: Tr. 208:13–15; Mikalauskas: Tr. 235:16–17.) It appears that the judge in his decision erroneously referenced the crew that Conci and Mikalauskas worked on at the time the Respondent purchased the coal mine in June 1998. The awareness meeting at issue occurred 6 months later in January 1999.

reason to reject their testimony. In turn, the judge then should consider Murray's statements as probative evidence of the Respondent's motive in connection with the June 1998 layoffs, which I now address.

#### The June 1998 Selections for Layoff

The judge found that the Respondent knew of the union support or activity of the 33 discriminatees selected for layoff; that after taking over the mine from Kerr-McGee, CEO Murray told employees several times that they had made the right decision in voting against union representation; and that when Murray was asked at meetings if he would have bought the mine if the employees had voted to unionize, he indicated, using his fingers, that the chances were "zero." Nonetheless, the judge found that, in selecting employees for layoff, the Respondent relied solely on neutral objective criteria. Finding that the Respondent had carried its *Wright Line*<sup>5</sup> burden, the judge concluded that it did not violate the Act when it laid off the 33 coal miners.

In this aspect of the case, as well, the judge failed to come to terms with important evidence tending to show that the challenged layoff decisions, for all their ostensible objectivity, were actually determined by antiunion animus. The decisions were based in crucial part on supervisory evaluations that are suspect. The Respondent's defense of its layoff decisions, in turn, was premised on the claim the process was insulated from CEO Murray, evidence of whose antiunion animus has already been discussed. Murray's testimony, however, was clearly dubious, a fact that should have been brought to bear in evaluating the Respondent's defense.

Central to the Respondent's *Wright Line* defense is its assertion that it applied objective criteria to select employees for layoff. These criteria included contemporaneous performance ratings completed by foremen, supervisors, and management during the days immediately preceding the layoffs. But the documentary evidence demonstrates that some of the Respondent's supervisors did consider and refer to union affiliation and activity in the evaluations that they prepared:

1. Roy Jones' evaluation of employee Bruce Clarry, an alleged discriminatee, states that Clarry is "a union organizer that has a chip on his shoulder for the company." [GC Exh. 13(t).] In contrast, Jones' evaluation of employee Dave McBride, who is not alleged as a discriminatee, states that "[h]e was working with [an employee who was] a union organizer and remained loyal to [the company]." [GC Exh. 13(t).]

<sup>5</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

2. David Strunk's evaluation of Clarry states: "Until about a year ago, Bruce had a good attitude about his job and Galatia mine. After that he became a leader in the UMW drive at Galatia. Even after the vote failed, Bruce continues to carry the banner." [GC Exh. 13(jj).]

3. Robert Conn's evaluation of Clarry states: "Bruce has a challenge with his attitude and was a strong union advocate." [GC Exh. 13(f).]<sup>6</sup>

4. Dave Columbo's evaluation of alleged discriminatee Edward Williams states: "car runner/20+ years experience big union man/drops down the whole unit using petty gossip[.]" [GC Exh. 13(uu).]<sup>7</sup>

While the number of such evaluations is small, they remain probative, not least with respect to the layoff decisions affecting the particular employees evaluated, because they undercut the Respondent's contention that union activity was not a factor in the evaluations. Moreover, approximately 10 percent of the underlying employee evaluations are missing and cannot be accounted for, which is not the only troubling evidentiary gap in the record.<sup>8</sup>

Without addressing the tainted evaluations, the judge concluded that union activity was not a decisive factor in the layoffs. He recited that a "large number" of supervisory personnel testified that they did not consider union sentiment in the evaluations they completed, and were told not to consider union affiliation in making the evaluations. Such statements are refuted by the evaluations themselves, which as just explained show that supervisors Jones, Strunk, Conn, and Columbo clearly *did* consider union sentiment, despite their contrary testimony. The judge, in any case, made no explicit credibility findings about any of the supervisors' testimony.<sup>9</sup>

<sup>6</sup> Conn testified that he thought "it was very important to tell them [management] that Bruce Clarry was a strong union advocate." (Tr. 1227:19-22.)

<sup>7</sup> Columbo testified that employee Williams "had alot of years in the Union and he did a lot of recruiting at work" (Tr. 1093:1-2), which meant "recruiting for the UMW" (Tr. 1095:24-1096:2), and that Columbo "thought it was something that new management should know." (Tr. 1095:20-23.)

<sup>8</sup> The evaluations were used to create a spreadsheet that served as the basis for the actual layoff decisions. The final version of the spreadsheet, however, is *not* part of the record: it was deliberately destroyed.

<sup>9</sup> The other supervisors cited by the judge are Charles Bowlin, Donald Eroh, Doug Harver, John Dunn, Calvin Melvin, Dan Ramsey, William Penrod, Jimmy Wilson, Steve Royce, Vern Brotherton, Duane Lambert, Vernon Dunn, James Allen, Jerry Whitehead, Daryl Tolbert, Doug Huie, William Devine, Denzil Hughes, Bob Dupuis, and Bruce Hill. Bruce Hill testified that he did not commence employment with the Respondent until approximately 3 months after the layoffs had occurred. (Tr. 1290:1-3.)

I do not see how the judge's *Wright Line* determination can survive his failure to make these findings. It is unclear, for example, how the judge could conclude that employee Bruce Clarry, one of the 33 alleged discriminatees, was laid off for lawful reasons. His evaluations establish that his union activity was considered. Presumably, the antiunion animus reflected there influenced the numerical rating Clarry was given, which in turn resulted in his layoff.<sup>10</sup> The record does not explain how the taint of antiunion animus could have been eliminated during the evaluation process. Testimony about instructions that union activity was not to be considered is insufficient to counter evidence that, in fact, it was.

Similarly, the judge failed to make clear credibility findings about CEO Murray's testimony that: (1) he did not ask supervisors to prepare employee evaluations to be used in the selection of employees for layoff; and (2) he played no role in selecting employees for layoff. Murray's testimony on both questions is contradicted.

Numerous witnesses, including the Respondent's president, Donald Gentry, testified that Murray did ask supervisors to prepare employee evaluations.<sup>11</sup> Indeed,

<sup>10</sup> Clarry was laid off because he received a low performance rating of "4." Clarry's supervisory evaluations included the remarks: "UMWA organizer, I cannot trust him" (GC Exh. 13(pp)); "a union organizer that has a chip on his shoulder for the company" (GC Exh. 13(t)); "became a leader in the UMWA drive" and "even after the vote failed . . . continues to carry the banner" (GC Exh. 13(j)); and "was a strong union advocate" (GC Exh. 13(f)). The evaluations make clear that other, critical comments about Clarry's performance were inextricably linked to his union activity. Clarry had received a positive evaluation in February 1998. In his testimony, supervisor Roy Jones admitted that his subsequent, negative evaluation of Clarry was based on a change in Clarry that Jones attributed to his relationship with the Union. (Tr. 985.)

<sup>11</sup> Gentry testified that he was familiar with who asked supervisors to evaluate employees, and that Murray did request supervisors to complete employee evaluations. He said:

Bob Murray and Mark Bartkowski interviewed management people as a team. Myself, Bill Mallicoat, and Maynard St. John separately interviewed as a separate team. And it's my understanding and my belief that both - when a manager interviewed with Bob Murray and Mark Bartkowski, and when they interviewed with us, they were requested to rate the people that worked directly for them or they had direct knowledge of their work performance.

(Tr. 578:2-16.) Numerous supervisors testified that Murray asked them to complete evaluations. Foreman Robert Conn testified that Murray asked him to complete employee evaluations. (Tr. 1214:2-6.) Foreman Steve Roy testified that Murray asked him to complete evaluations of employees that worked for him. (Tr. 1077:16-25.) Foreman David Strunk (Tr. 1045:7-14), foreman Danny Ramsey (Tr. 1022:16-18), foreman Donald Eroh (Tr. 966:22-25; 967:25-968:1), foreman Dwayne Lambert (Tr. 1099:9-16), and foreman Daryl Tolbert (Tr. 1124:24-1125:7) each testified that he was asked by Murray to complete evaluations of employees. In addition, the evaluations submitted by foreman

when recalled at the end of the hearing, Murray testified that "I am told by [Respondent's counsel] that there has been some testimony, that I directly asked some employees to rate the people under them . . . "I guess it's a little fuzzy as to who really asked them." (Tr. 1324:10-13.)

Likewise, Murray's unequivocal and repeated assertions that he "played no role at all in the selection of those people who were about to be reduced [laid off]," (Tr. 79:5-6),<sup>12</sup> were also contradicted by Eric Anderson and Clyde Borrell. Anderson and Borrell were employed by the Respondent for the purpose of assimilating the data, including employee evaluation scores, upon which the Respondent's layoff decision was made. Their testimony was specifically credited by the judge. Murray denied ever seeing the spreadsheet (GC Exh. 6) that listed each employee's name and corresponding score from the supervisory evaluations, and which was the principal document that the Respondent used in selecting employees for layoff.<sup>13</sup> Anderson testified, however, that he saw CEO Murray looking at the spreadsheet. (Tr. 862:17-863:1.) A review of the spreadsheet (GC Exh. 6) shows green markings next to the names of 80 employees, reflecting, according to the credited testimony of Borrell, some sort of comment by CEO Murray. (Tr. 927:13-25; 944:11-13.)<sup>14</sup> Borrell testified that "Mr. Murray came in at the very end, and reviewed the list that we had put together . . ." (Tr. 944:14-17.) There is a square conflict, then, between the testimony of CEO

Dave Washinsky (GC Ex. 13(pp)) states on a cover sheet, "Mr. Murray, I ranked the people attached."

<sup>12</sup> He declared: "I was not involved at all, in any way, in the determination of anyone that was laid off in applying those criteria." (Tr. 1327:9-11.) "I had no input in the process. Into the actual decisions." (Tr. 1328:19-20.)

<sup>13</sup> Murray testified:

Q: You referred to someone making some spreadsheets that were used in making the [layoff] decision. Were you familiar with those spreadsheets, or did you ever see those spreadsheets.

A: No I did not. [Tr. 86:9-12.]

<sup>14</sup> As Anderson explained:

Q: Who took the final information, the numbers that were produced in General Counsel's Exhibit No. 6 [the spreadsheet], and from that, made the decision as to who to terminate, or who not to retain?

A: Mr. St. John was privy to this sheet, as you can see his initials there. Mr. Gentry was obviously involved in these decisions. And I know, as I testified yesterday, that Mr. Murray had made some comments on some individuals. As far as the actual decision, who would go or who would stay, it was . . . all those three would look at the numbers, as a group, and really decide, from person-to-person, to my knowledge, who would go. [Tr. 861:25-862:16.]

Murray<sup>15</sup> and the credited testimony of Anderson and Borrell.

### Conclusion

Under *Wright Line* it was the Respondent's burden to prove that it would have laid off each of the 33 alleged discriminatees regardless of his union affiliation and activity. Entirely apart from the troubling destruction and disappearance of some documents, the documentary record contains ample evidence of antiunion animus on the part of the Respondent's supervisory personnel. The judge himself found that CEO Murray had made statements consistent with a strong desire to avoid unionization of the Respondent's work force.

If the layoff decisions challenged here were the result of a process directed by CEO Murray, if CEO Murray falsely disclaimed any role in that process, if Murray falsely denied requesting the preparation of supervisory evaluations like those that demonstrably considered union activity, and if Murray later stated that the Respondent would not hire pronoun workers, then the Respondent's invocation of objective criteria might well have been a pretext, with respect to some or all of the 33 employees involved here, to eliminate union supporters. At this stage of the litigation, given the judge's failure to make crucial factual findings and credibility determinations, it is certainly impossible to conclude that the Respondent did *not* discriminate. The majority's willingness to do so strikes me as clearly wrong, and therefore I dissent.

Dated, Washington, D.C. August 1, 2002

---

Wilma B. Liebman, Member

### NATIONAL LABOR RELATIONS BOARD

*Christal J. Cuin and Paula Givens, Esqs.*, for the General Counsel.

*Richard E. Lieberman, Jules I. Crystal, and James A. Lawson, Esqs. (Ross & Hardies)*, of Chicago, Illinois, for the Respondent.

*Richard J. Whitney, Esq. (Speir & Whitney)*, of Carbondale, Illinois, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On December 22, 1998, Bill Bishop, an individual, filed a charge in Case

---

<sup>15</sup> Murray, recalled to the witness stand at the end of the hearing following the testimony of Anderson and Borrell, admitted that he was in the room where the layoff selection process was taking place for 30 to 45 minutes (Tr. 1326:21–22), but testified that “he hadn’t focused on a single name.” (Tr. 1327:21–22.)

14–CA–25400 against the American Coal Company, Respondent herein.

Thereafter, on May 28, 1999, the National Labor Relations Board, by the Acting Regional Director for Region 14, issued a complaint, which was amended on August 5, 1999 and again on August 25, 1999.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when on June 23, 1998, it laid off 33 employees because the employees formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities and further that Respondent violated Section 8(a)(1) of the Act when on January 8, 1999 by its Chief Executive Officer Robert E. Murray it “informed employees that Respondent would not hire employees who supported the Union” and “informed employees that it had terminated employees because of their support for the Union and now that it was rehiring, it would not hire employees who supported the Union.”

Respondent filed an answer in which it denied it violated the Act in any way.

The case was tried before me in West Frankfort, Illinois, from August 31, 1999 through September 3, 1999, and in Harrisburg, Illinois, from November 1, 1999 through November 5, 1999.

Based on the entire record in this case, to include posthearing briefs submitted on March 20, 2000, by the General Counsel, Respondent, and the Charging Party, and upon my observation of the witnesses and their demeanor, I have concluded that Respondent did not violate the Act in any way. More specifically I make the following<sup>1</sup>

### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, Respondent, a Delaware corporation, with an office and coal mining facility in Galatia, Illinois, has been engaged in the underground mining and surface preparation of coal for shipment.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the United Mine Workers of America, herein the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Introduction

In early January 1998 a group of five employees who worked for Kerr-McGee at the Galatia, Illinois coal mine went

---

<sup>1</sup> Respondent's motion to strike portions of the General Counsel's brief is denied. The arguments made by the General Counsel in the objected to portions of the brief are all fair comment and argument based on the evidence as she views it and not objectionable.

to see a representative of the United Mine Workers seeking assistance in organizing the employees at the Galatia coal mine. The five employees were Bruce Clarry, Larry Brown, Mark Hall, David White, and George Yarbrough. All but Mark Hall would later be laid off after the mine was sold to Respondent. The union was somewhat reluctant to assist these employees as previous efforts to organize the mine had not met with success.

The five employees returned to work with union authorization cards and union stickers and tried to get their fellow employees to join the Union.

Kerr-McGee resisted the union organizing effort and campaigned against the Union. It urged its production foremen, supervisors and managers to try to ascertain how the employees felt about the Union.

On May 14 and 15, 1998 the National Labor Relations Board conducted a representation election at the Galatia mine. The employees voted 318 to 146 to reject representation by the Union. In other words, the Union lost the election by more than 2 to 1.

On June 16, 1998, some 2 months after the election, Respondent purchased the mine from Kerr-McGee. Respondent had earlier made what it called a "preemptive bid" to buy the mine prior to the union election but it was rejected by Kerr-McGee. After the election Respondent submitted a second bid to buy the Galatia mine which was accepted by Kerr-

McGee. The second bid was 33.3 percent higher than the "preemptive bid" made by Respondent prior to the election and was accepted by Kerr-McGee.

Respondent's chief executive officer, Robert E. Murray, testified without contradiction that the Galatia mine was 26th in the country in productivity but third in employment, i.e., although it had the third highest number of employee of any coal mine in the United States it was only 26th in productivity.

When Respondent took over the mine it set as its first task the elimination of a number of jobs. It wanted to eliminate between 210 and 250 of the more than 600 hourly and salaried jobs. Within a 4-day period Respondent selected 160 salaried employees and 86 hourly employees for permanent layoff.

It is alleged in this case by the General Counsel that the 33 named discriminatees in the complaint were selected for permanent layoff and laid off on June 23, 1998 because of their support for the Union during the union organizing campaign some months earlier when the mine was owned by Kerr-McGee.

It is also alleged that Respondent, through its chief executive officer Robert E. Murray, made certain 8(a)(1) statements on January 8, 1999, which also tend to support the allegation that the discriminatees were unlawfully laid off.

Respondent laid off more salaried employees (160) than hourly employees (86). Thirty three (33) hourly employees are alleged discriminatees. Respondent claimed it used a criteria for lay off that did not discriminate against employees based on union activity or support. Respondent admits discrimination in the layoff selection process in favor of women and minorities but vehemently denies discrimination in selection for layoff based on activity on behalf of the Union or support for the Union.

### *B. Respondent's Criteria for Layoff*

With respect to salaried employees, Respondent restructured the salaried job organization which resulted in the elimination of job positions, including an entire layer of management, and, after a series of interviews, salaried employees were selected to fill the remaining jobs. Those not chosen were laid off and they numbered 160.

With respect to hourly employees, which included the 33 discriminatees in this case, Respondent employed a different criteria for selecting employees for lay off. CEO Murray created a transition team to come up with a performance based criteria for the layoffs and they did. In the end, three criteria were selected upon which to base individual termination decisions: 1) the average number of yearly absence occurrences for each employee over a 3.5 year period, 2) the total number of disciplinary letters on file for each employee for the past 3.5 years; and 3) contemporaneous performance ratings completed by foremen, supervisors and management during the days immediately preceding the layoffs but after Respondent took over the mine on June 17, 1998, which, of course, was after the Union campaign and the election.

### *C. Respondent's Knowledge of Union Activity or Support Among the Employees Selected for Layoff*

In all, 86 hourly employees were selected for lay off 33 of whom are discriminatees in this case. Some laid off employees were added and some deleted from the complaint at the request of the laid-off employees apparently because they were pursuing other avenues of relief. The case went to trial with 33 alleged discriminatees. One of the three criteria used in selecting hourly employees for lay off was performance evaluations furnished by foremen, supervisors and management. Again, these evaluations were made after respondent took over the mine on June 17, 1998 and after the union election of May 14 and 15, 1998.

In her brief, counsel for the General Counsel has accurately recited the evidence at the hearing before me which leads me to conclude that Respondent, threw its supervisors and agents, knew of the union support and/or activity of the 33 discriminatees selected for layoff. See, e.g., *MacDonald Engineering Co.*, 202 NLRB 748 (1973).

In February 1998, discriminatee David L. Amberger put a union sticker on his hard hat. Mine manager Denzil Hughes, in the presence of Production Foreman Vernon Dunn, asked Amberger why he had the union sticker on his hard hat. Amberger responded that he was wearing the sticker to show his support for the Union. Hughes told Amberger that his days of filling in as a boss were over because he supported the Union.

About 3 weeks before the election, assistant mine manager Don McCluskey initiated a conversation with discriminatee Mark D. Anderton about the Union. It is uncontroverted in the record that Anderton told McCluskey that he supported the Union. On about seven or eight occasions during the union campaign, McCluskey attempted to give Anderton antiunion literature. On one such occasion in mid-April, McCluskey told Anderton that he supposed Anderton did not want any of the antiunion literature.

During the union campaign, discriminatee James A. Barton wore a union sticker on his hard hat. In mid-April, Assistant Mine Manager Robert Dupuis walked up to mine examiners Barton, Dolly Monte, and Brad Slankard. Dupuis said that he was very disappointed that Barton, Monte, and Slankard supported the Union. Dupuis stated that he did not feel they needed a union and that they could bargain with the company on their own without a union. Barton responded that he felt they needed a union and then asked Dupuis if they could bargain without a union could he have a raise. Dupuis then walked out of the room. In his evaluation, Dupuis stated that Barton had a negative attitude towards his employment.

During the union campaign, discriminatee Wayne K. Beal openly encouraged employees to support the Union. Beal regularly ate meals and spent non working time with a group of strong union supporters including Tim Russell, Jerry Sexton, and Bill Bishop. During the union campaign, assistant mine manager Hughes initiated a conversation with employees Lester Burklow, Vigil Carpenter, and Wayne Beal. During this conversation, Beal stated he supported the Union because with a union, employees would have seniority rights.

In February, discriminatee William Bish put a union sticker on his hard hat.

Assistant mine manager Hughes testified he knew that discriminatee and charging party Bill Bishop supported the Union. In February, Bill Bishop put two union stickers on his hard hat. Maintenance department manager Rocky Pike also admitted he knew Bishop supported the Union. Pike knew this because he observed Bishop wearing a union sticker. The notes supervisors put on their evaluations of Bishop show that they were happy with his work, but his disagreement with the manner his employer operated the mine resulted in a poor score for him. For example, Mine Manager James Wilson wrote, "good worker, but complains and potential troublemaker." Other supervisory comments about Bishop included, "disruptive" "bad attitude" and "deadwood or attitude problem."

In mid-April, discriminatee Michael Brogan began displaying a union sticker on his hard hat.

Discriminatee Larry Brown was one of the five employees who went to the Union to get the union campaign started. Larry Brown distributed about 75 union authorization cards. Right after the January 5 organizing meeting Larry Brown put a union sticker on his hard hat. In April, Mine Manager Doug Grounds initiated a conversation with Larry Brown. Grounds asked why Larry Brown thought the employees needed a union. Larry Brown replied that safety was the primary reason. In March, right after the Union had filed its petition seeking to represent Kerr-McGee's employees, Grounds, in the presence of mine manager Scott Schapkoff, asked Larry Brown why the employees wanted a union. Brown responded that employees were concerned about mine safety. Specifically, Brown told Schapkoff and Grounds that employees were concerned about the recent fire in the mine. Production foreman Doug Huie admitted that he knew Brown supported the Union. Maintenance department manager Rocky Pike also admitted he knew Larry Brown supported the Union. Pike knew this because he observed Brown wearing a union sticker. Brown also attended the vote count to show support for the Union.

Electrical instrumentation foreman Bob Conn told discriminatee Larry S. Brown that he had gotten word from upper management that Larry S. Brown was one of the union instigators. Larry Brown and Larry S. Brown are different men. Conn continued that Brown had better watch himself. Brown responded that he supported the Union because of safety issues. During his testimony, Conn did not deny this conversation with Brown. About 2 weeks before the election, mine manager William Penrod raised the issue of the Union to Larry S. Brown. Brown told Penrod that he supported the Union. Foreman Conn's evaluation of the three employees in his department who supported the Union, Dwight Pray, Larry S. Brown, and Bruce Clarry, all refer to a problem with their "attitude." Pray was not laid off. Although Brown and Clarry were laid off.

On the day of the election, Mine Manager Scott Schapkoff asked discriminatee Benjamin Cain how he felt about the Union. Cain replied that he thought voting for the Union was a good thing.

In separate conversations during the union campaign, Production Foreman John Dunn and Mine Manager William Penrod asked discriminatee Lawrence E. Carmon how he felt about the Union. Carmon told Dunn and Penrod that he supported the Union. During the week preceding the May election, Dunn offered Carmon a "vote no" sticker, which Carmon declined. Maintenance department manager Rocky Pike testified he knew Carmon supported the Union because of statements Carmon made and because Pike observed Carmon wearing a union sticker.

In February, discriminatee George David Chick placed a union sticker on his hard hat and on his lunch box. Chick openly discussed his support for the Union and encouraged other employees to vote for the Union. Production Foreman John Dunn admitted that he knew Chick was a leading union organizer. Mine Manager William Penrod also admitted that he knew Chick supported the Union. Although Penrod testified that Chick had a performance problem, the evaluation mentioned only an "attitude problem." Mine Manager James Wilson's evaluation of Chick stated that Chick was a good operator, but a potential troublemaker. Production Foreman Doug Huie referred to Chick as, "hard to satisfy."

Discriminatee Bruce E. Clarry was one of the five employees who instigated the union campaign. Clarry gathered signatures on about 30 union authorization cards and distributed about 75 union stickers. He was also an observer for the Union at the May 14 and 15 election and was present for the vote count. In February, foreman Roy Jones approached Clarry and asked him to remove the large UMWA bumper sticker Clarry had on his hard hat. In March, mine manager Doug Grounds told Clarry that he was concerned about the UMWA sticker and the organizing campaign because it would hurt the sale of the mine. Clarry replied that employees were concerned about a mine fire and an explosion in the mine and safety was a key issue behind the union campaign. In March, maintenance foreman Bobby Jones told Clarry that his name was being thrown around among management as a union supporter and Clarry had better watch himself and be careful. During the May election, a local television station aired an interview with Clarry in which he stated he supported the Union because of safety issues. Staff



mine engineer James Webb admitted that he knew Clarry supported the Union. Statements made by supervision in their June evaluations also show that management knew Clarry was a leading union organizer. The following are comments supervisors made about Clarry in their evaluations: "until about a year ago, Bruce had a good attitude about his job and Galatia Mine. After that, he became a leader in the UMWA drive at Galatia. Even after the vote failed, Bruce continues to carry the banner. He does continue to do his job. Bruce has great potential"; "thinks he is mistreated"; "hard to satisfy"; "a union organizer that has a chip on his shoulder for the company"; "UMWA organizer, I cannot trust him"; and "Bruce has a challenge with his attitude and was a strong union advocate". Maintenance manager Rocky Pike admitted that he knew Clarry supported the Union because he observed Clarry wearing a union sticker. Maintenance foreman Roy Jones admitted he knew Clarry was a leading union organizer because of stickers he wore, because employees reported to Jones that Clarry attended union meetings and because of the people with whom Clarry associated. Jones testified that discriminatees David White and George Yarbrough were the other union organizers that Clarry associated with. Maintenance foreman Strunk, electrical instrumentation foreman Conn and long wall maintenance foreman Talbert testified they knew Clarry was a union organizer.

About the second week of January discriminatee Barbara J. Crabtree put a union sticker on her hard hat. In his evaluation of Crabtree, Production Foreman Doug Huie referred to her as "hard to satisfy" and a "follower." Foreman Huie admitted he observed Barbara Crabtree wearing a union sticker.

During the union campaign, discriminatee Tony J. Crisp wore a union sticker.

In mid-April, discriminatee Lance A. Damm put a union sticker on his hard hat. During approximately the first week of May, assistant mine manager Robert Dupuis told Damm that he really needed to pay attention to the antiunion film that the company was showing. Damm had a prounion sticker on his hat during this conversation.

In March, discriminatee Mark E. Donoghue put a union sticker on his hard hat.

During the union campaign, discriminatee Marty J. Gayer distributed union leaflets at the mine. In March, Mine Manager William Penrod told Gayer that an employee had felt threatened when Gayer spoke to the employee about the Union. Penrod said if there were any other such reports Gayer would be disciplined. A few weeks before the election, production foreman Doug Harner initiated a conversation with some employees during dinner. Gayer told Harner that he supported the Union because of safety issues and because, with a union, a layoff would have to be done by seniority. During meetings when production foremen John Burke and Steve Roye distributed antiunion literature, Gayer voiced his support of the Union. Maintenance Manager Rocky Pike admitted he knew Gayer supported the Union because of statements he heard Gayer make.

Mine examiner and discriminatee Ernest Eugene Harvel put a union sticker on his hard hat in January. In mid-April, Harvel told Assistant Mine Manager Terry Ward that Harvel believed the employees needed a union because of safety issues in the

mine. Foreman Huie admitted that employees told him that Harvel supported the Union. On his evaluation, Huie wrote that Harvel was "hard to satisfy."

In February, discriminatee Dennis Lampert put a union sticker on his hard hat. During meetings when Foremen John Burke and Steve Roye distributed antiunion literature, Lambert voiced his support of the Union. About two weeks before the May election, Roye verbally disciplined Lambert for soliciting for the Union during worktime. In separate conversations, Lambert told maintenance manager Calvin Melvin and Foreman Dave Strunk that he supported the Union. Melvin wrote in his evaluation that Lambert had an "attitude problem." Maintenance manager Rocky Pike admitted that he knew Lambert supported the Union because of statements Lambert made and because he observed Lambert wearing a union sticker.

In about March, discriminatee Alan L. Minton spoke with foreman Dwayne Lambert and advised him that he supported the Union because of the pension benefits provided by the Union. Maintenance Manager Pike wrote in his evaluation that Minton had an "attitude problem."

In March, discriminatee Dolly M. Monte put a union sticker on her hard hat and assistant mine manager Dupuis approached her and said when this was all over she would be sorry for supporting the Union. Monte responded that she supported the Union because of safety issues in the mine. In mid-April, Dupuis told discriminatees Barton, Monte, and Slankard that he was very disappointed that they supported the Union. Respondent laid off three of the six examiners on Monte's crew, Barton, Slankard, and Monte.

Discriminatee Bernard A. Reynolds was one of three examiners on the B crew who Respondent laid off. Reynolds wore a union sticker during the union campaign.

During the first part of March, discriminatee Timothy L. Russell put a union sticker on his hard hat. Assistant Mine Manager Hughes and staff engineer Webb both admitted they knew Russell supported the Union. Hughes testified Russell was a hard worker, but that Russell complained a lot and talked down the Company. Right before the May 14 vote, Mine Superintendent Mike Davey and Assistant Mine Manager Hughes approached Russell. Davey commented "nice sticker." Right after the election, Davey and Hughes approached discriminatees Sexton and Russell and asked why they had pushed so hard for the Union. Russell responded he was concerned about safety.

In about March, discriminatee Thomas Simpson put a union sticker on his hard hat. Maintenance Manager Pike admitted that he knew Simpson supported the Union because of statements Simpson made and because Pike observed Simpson wearing a union sticker.

In March, discriminatee William B. Slankard put a union sticker on his hard hat. In mid-April, Assistant Mine Manager Dupuis walked up to discriminatees Barton, Monte, and Slankard, and said that he was very disappointed that Barton, Monte, and Slankard supported the Union.

In January, discriminatee Larry D. Thuilliez put a union sticker on his hard hat. Right after Thuilliez put the sticker on his hard hat, Production Foreman Charles Bowlin asked him why he wanted a union. Thuilliez responded that he was inter-

ested in the pension and benefits. During the Union's campaign, Thuilliez distributed union stickers. During meetings when foremen Burke and Roye distributed antiunion literature, Thuilliez voiced his support of the Union. In March, mine manager Doug Grounds asked Thuilliez why he supported the Union. Thuilliez responded it was because of the pension and retirement rights. Maintenance Foreman Pike admitted he knew Thuilliez supported the Union because of statements Thuilliez made and because he observed Thuilliez wearing a union sticker. Electrical instrumentation foreman Jerry Whitehead put on his evaluation of Thuilliez "bad attitude never impressed me." Whitehead formed this opinion about Thuilliez based on comments he had heard Thuilliez make in the staging area. Whitehead admitted he could not make any assessment about Thuilliez' work, because he did not have enough knowledge about his work to comment on it.

In February, discriminatee Michael E. Vosbein put a union sticker on his hard hat. During the week preceding the election, Assistant Mine Manager Hughes asked Vosbein why he supported the Union. Vosbein responded that it was because of safety issues. During that same week, mine manager Doug Grounds asked Vosbein why he was wearing a union sticker. Vosbein declined to respond. During the week of the election, mine manager James Wilson spoke to employees in Vosbein's crew and distributed some antiunion literature. While distributing this literature, Wilson asked for feedback. Vosbein told Wilson that it did not matter what Wilson said, he was still going to vote for the Union.

During the union campaign, discriminatee Michael L. Wallace wore a union sticker.

Discriminatee David G. White was one of the five employees who initially went to the Union to get the union campaign started. On about January 6, White put a union sticker on his hard hat. White gathered about 25 union authorization cards, openly encouraged employees to vote for the Union, told them about upcoming union meetings and distributed union leaflets. White attended the vote count to show support for the Union. Respondent laid off three out of the five mine examiners C crew, i.e., discriminatees David White, George Yarbrough, and Ernest Harvel. In mid-April, White asked Assistant Mine Manager Terry Ward why management never approached him to talk about the Union. Ward responded that he knew White supported the Union because of safety issues and there was no way to change White's opinion. Maintenance Foreman Roy Jones testified that employees David White and George Yarbrough were the other union organizers with whom Bruce Clarry associated. Webb testified he knew White supported the Union. Statements made by supervisors on their June evaluations of White include "My opinion of him is that he is opinionated and a troublemaker"; "bad attitude, contagious"; and "deadwood or attitude problem."

On his evaluation of discriminatee Edward A. Williams, production foreman Dave Colombo wrote, "big union man." About 1 week before the election, Colombo had initiated a conversation with Williams about the Union. Colombo told Williams that if the Union came in, the company might lose contracts and the mine might shut down. Williams told Co-

lombo that he had 20 years in the Union and he supported the Union because it would allow him to increase his pension.

During meetings when foremen John Burke and Steve Roye distributed antiunion literature, discriminatee Charles T. Wright voiced his support of the Union. Maintenance Manager Pike admitted he knew Wright supported the Union because of statements Wright made and because he observed Wright wearing a union sticker. Electrical instrumentation foreman Jerry Whitehead put on his evaluation of Wright "bad attitude." Whitehead admitted that he formed this opinion about Wright based on comments he had heard Wright make in the staging area. Whitehead also admitted he could not make any assessment about Wright's work, because he did not have enough knowledge about it to comment on it.

Discriminatee George T. Yarbrough was one of the five employees who initially went to the Union to get the union campaign started. Yarbrough gathered about 50 union authorization cards and distributed about 75 union stickers. As a mine examiner, Yarbrough traveled throughout half of the mine every day. While traveling through the mine Yarbrough distributed union literature. As a mine examiner, Yarbrough's job required him to perform safety inspections. Mine safety was the most important issue in the union campaign. In April, mine manager Scott Schapkoﬀ denied Yarbrough's request to take off on Easter Sunday. Schapkoﬀ admitted that part of the reason he refused was because Yarbrough supported the Union. Maintenance foreman Roy Jones testified he knew discriminatees Yarbrough, White and Clarry were union organizers. Staff engineer James Webb admitted he knew Yarbrough supported the Union. Production Foreman Doug Huie admitted he knew Yarbrough was a union supporter and that he provided Kerr-McGee's management information about which employees supported the Union.

Respondent admits that mine superintendent Mike Davey, mine managers Doug Grounds, Todd Grounds, William Penrod, Scott Schapkoﬀ, and James Wilson, Assistant Mine Managers Robert Dupuis, Denzil Hughes, Terry Ward, and manager of Employee Relations William "Bosco" Watson was supervisors and agents of Respondent within the meaning of the Act.

Respondent denies that the production foremen, electrical instrumentation foremen, maintenance foremen, maintenance department manager, and staff mine engineer were supervisors or agents within the meaning of the Act.

The men who held these positions under Kerr-McGee held the same positions under Respondent. They were not eligible to vote in the May 1998 election among Kerr-McGee's employees. And Respondent relied, along with other factors set forth more fully below, on their evaluations of employees in deciding which employees would be retained and which employees would be laid off. Lastly, the evidence at trial reflects that the production foremen directed the work of crews of men numbering between 8 and 10.

I find that the production foremen, electrical instrumentation foremen, maintenance foremen, maintenance department manager, and staff mine engineer are supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

#### D. Credibility Resolutions

In reaching the conclusions I reach that Respondent did not violate the Act. I have made a number of credibility resolutions. I will speak to a number of them separately.

##### 1. Testimony of James Webb

James Webb was a staff mine engineer and after Respondent took over the mine but before the layoffs were announced on June 23, 1998 Webb testified he was interviewed by CEO Robert E. Murray and Murray told him in the presence of Mark Bartkowski and possibly Keith McGilton who came in during the interview that he wanted a list of employees who were dead wood and a list of employees who were union supporters because now is the time to get rid of them.

Webb said he prepared such a list and slipped it under the door of the office of Steve Rowland, a Kerr-McGee management official who did not go with Respondent.

The list contained the names of 25 hourly employees. They were listed as "dead wood or attitude problem." Some of the names on the list were those of discriminatees in this case. They were not specifically identified as union supporters and some on the list were not union supporters.

Webb claims he listed 10 discriminatees among the 25 because of their support for the Union, and did not specifically state they were union supporters or words to the effect because he had been instructed by Kerr-McGee not to identify employees in writing as being union supporters. His evaluation ranked all sorts of people and is quite lengthy and at no point does it state anything about a union.

Murray claims he never asked anyone for a list of union supporters, which would include, of course, James Webb.

Mark Bartkowski was not called as a witness by either side.

Keith McGilton, a management official of Respondent, testified that no one was asked to make a list of union supporters.

Webb quit Respondent's employ some 6 months after Respondent took over the mine. At one point he made a claim against Respondent with the Illinois Department of Labor for vacation pay and severance pay.

Looking at Webb's evaluation (GC Exh. 13 qq) which is several pages in length and hearing the testimony of Webb, Murray, and McGilton I do not credit the testimony of James Webb.

##### 2. Ed Williams and Vern Brotherton

Discriminatee Ed Williams, who had been a union man for 20 years, worked for Kerr-McGee. His immediate supervisor was Production Foreman Dave Columbo. During the union organizing campaign Columbo told Williams that he knew Williams was prounion.

In his evaluation of Williams, Columbo wrote that Williams was a "big union man." According to Williams he and Columbo had not gotten along.

Williams was laid off on June 23, 1998.

Williams testified that early in the summer of 1999 he went to his daughter's softball game and met and spoke with Production Foreman Vern Brotherton. Williams asked Brotherton why he (Williams) had been laid off and, according to Williams, Brotherton said it was because Williams had too much

union time and because of Dave Columbo, whom Brotherton said he saw write down Williams' name and put UMW next to it. In addition, according to Williams, Brotherton said Murray asked him and other foremen to write down the names of "troublemakers, union people, and a (sic) policy abusers."

Brotherton admits he spoke with Williams at the game but testified that Williams asked him if he could put Brotherton's name down as a job reference and Brotherton said yes. And that was all that was said.

I credit Williams. He appeared honest and was corroborated by the fact that Columbo did put in writing in his evaluation of Williams that Williams was a "big union man."

Brotherton's statement to Williams is not alleged as a violation of the Act but was introduced by the General Counsel to show Respondent's motivation in selecting employees for lay off.

Just because Brotherton thought that Williams was selected for lay off because of his support for the union doesn't make it so.

Brotherton may have thought that this was the reason Williams was laid off and he is in good company because counsel for the General Counsel firmly believes likewise but on the basis of all the evidence I conclude otherwise. I do not credit as accurate Williams' statement in its entirety about what Murray said to Brotherton and the other foremen. I do not find that Murray asked the foremen to list "union people" but Brotherton well might have said this to Williams.

##### 3. Derek Haskins and Bruce Hill

Derek Haskins was laid off on June 23, 1998 but is not a discriminatee in this case.

He testified that he spoke with Bruce Hill, Respondent's vice president for human resources, in October 1998 at a Days' Inn in Benton, Illinois in connection with resolving a matter and Haskins told Hill that Haskins found it hard to believe that Respondent laid off discriminatee Marty Gayer.

According to Haskins, Hill said if you think Marty Gayer feels bad how do you think William "Bosco" Watson feels because Watson was asked to prepare a list of which employees supported the Union and then Respondent let Watson go. Watson was manager of employee relations.

Bruce Hill admits he met with Haskins and said how do you think Bosco Watson feel because Watson was asked to put together a list one day and fired the next. But, according to Hill, he was referring to a list of absenteeism and discipline and not a list of union supporters.

I credit Hill over Haskins. I do not believe Haskins said anything he did not believe to be the truth but it just doesn't make sense for Hill to have said to Haskins what Haskins claims he said about Watson being asked to prepare a list of union supporters.

Interestingly enough Watson worked in the building where one of the 2 weeks of trial was held in this case. He was readily available to be called as a witness. No one called Watson to testify.

#### 4. Allegations by Rocky Pike

Rocky Pike was a maintenance department manager who was laid off in June 1998. He is a management official and not a discriminatee.

In April 1998 CEO Robert Murray toured the Galatia mine. This was before Respondent's purchase of the mine. Murray asked Pike if Pike thought the Union would win the election. Pike said no and Murray said "good." This is not alleged nor is it an unfair labor practice. It does reflect that Murray would prefer that the mine remain nonunion but I don't believe that is seriously disputed.

After Respondent took over the mine, Pike claims that he was interviewed by Murray and Mark Bartkowski. Murray read him a list of employees' names and Pike was asked if they were union supporters or not. Pike answered Murray but doesn't remember the names of the employees he was asked about.

Bartkowski did not testify. Murray admitted he spoke with Pike and more than 100 others just after taking over the mine but denies Pike's allegations that he asked about union supporters among the workforce. I do not credit Pike's testimony. Pike had a motive to fabricate, i.e., he had been fired by Respondent.

#### 5. Carlos Burton and John Dunn

Carlos Burton was laid off by Respondent on June 23, 1998 but is not a discriminatee. Burton testified that he ran into production foreman John Dunn in a restaurant in Harrisburg, Illinois, after he had been laid off.

He asked Dunn why he had been laid off and Dunn, who initially said he didn't know why, said, after Burton kept pressing him, that Dunn's understanding was that people were laid off because of workmen's compensation, sick days, and union support.

Dunn admits he ran into Burton at the restaurant but claims he told Burton that he (Dunn) did not know why Burton was laid off and didn't say anything about the Union.

Dunn still works for Respondent. I found Burton to be quite credible and believe that when Burton pressed Dunn as to why Burton was laid off Dunn said that it could have been, in part, because of Burton's union activity. However that doesn't make it so. I find that Dunn really didn't know why Burton was fired but opined that workmen's compensation, sick days and union support were the reasons. Dunn may well have thought that union activity by Burton was a factor in his layoff and possibly others but I conclude otherwise.

#### 6. Steve Falmier and Don Cotter

Steve Falmier was laid off by Respondent on June 23, 1998 but is not a discriminatee in this case. He testified that he asked production foreman Don Cotter after Respondent announced there would be lay offs if he (Falmier) would be kept on or laid off. According to Falmier, Cotter said it would depend on how active he was in the union and how many times he was hurt.

Cotter who left Respondent's employ in early November 1998 did not testify.

Falmier appeared believable and I credit his testimony. I find however that Cotter was expressing his opinion only.

Even if production foremen are supervisors and agents within the meaning of the Act as I so find, they are low in the chain of command and there is no evidence that I credit which puts them in the group that made the decision as to who was laid off and what the criteria was for being selected for layoff.

#### 7. "Mysterious Markings" on GC Exhibit 5

General Counsel's Exhibit 5 was a tally sheet Respondent used to record evaluation scores given employees by foremen, etc.

There is on GC Exhibit 5 something marked out or scratched out above the names of some of the discriminatees, i.e., Bill Bish, Bruce Clarry, George David Chick, Barbara Crabtree, Ernest Eugene Harvel, David White, and George Yarborough.

However, there is something marked out or scratched out above the names of several other people, i.e., Lynn Barnett, Bill Beltz, Jim Bennis, Kelly Hefner, Terry Johnson, Roger Joyner, Ed Lanum, Tim Smith, Dave Spiller, Ron Wilson, and Sam Woods, none of whom are alleged discriminatees and about which there is no evidence they even supported the Union.

Respondent tried to explain the marked out or scratched out portions above certain names by saying they made marks to crosscheck similarly named persons on another list.

I don't know why the marked out or scratched out areas are there but it is for 7 of the 33 discriminatees and for another 11 person who are not discriminatees.

In other words, it doesn't help one way or the other in deciding whether or not Respondent violated the Act in any way.

#### *E. The Layoff of 86 Hourly Employees to Include the 33 Alleged Discriminatees in this Case*

As noted above Respondent took over the Galatia Mine on June 16, 1998 and immediately set about the task of eliminating salaried and hourly employees. Within a period of 4 days Respondent had decided that 160 salaried employees and 86 hourly employees would be terminated. The legality of the lay off of the salaried employees is not an issue in this case.

Further, it is not alleged that Respondent violated the Act in conducting a lay off of hourly employees but only that Respondent violated the Act in selecting the alleged discriminatees to be among the employees laid off.

On June 17, one day after the closing, a transition team was appointed by Murray to administer the managerial and operational transfer from Kerr-McGee to Respondent including the proposed work force reduction. Most of the members of the transition team were consultants retained by Respondent from Murray's other coal companies, and they were selected based upon their individual expertise and experience in various areas of the coal mining business. The transition team was comprised of the following individuals: Robert E. Murray; Murray's three sons Robert, Jonathan and Ryan; Donald Gentry; Maynard St. John; William Mallicoat; Mark Bartkoski, Eric Anderson; Clyde Borrell; Robert Moore; Paul Piccolini; John Forrelli; Greg Smith; Jerry Taylor; Jerry Fankhauser; Ernie Martin, Pat Swallie, and Keith McGilton. No member of the team had ever been employed by Kerr-McGee, nor did any member have any prior knowledge of the mine or its hourly or salaried employees.

Within hours after their appointment to the transition team, team members traveled to Galatia from various locations outside Illinois to begin taking control of the business. Following their arrival in Marion, Illinois, at approximately midnight on June 17, the team was assembled in a local hotel conference room for a meeting regarding the transition process. There, Donald Gentry, the newly appointed president of Respondent, and Murray outlined a multitude of tasks to be completed by the team when they visited the mine later that morning. These tasks included delivering insurance and permit bonds to government agencies (to transfer title of the mine to Respondent) and analyzing the mine's myriad departments and processes for wastefulness and areas for improvement. In addition, and most critical for the eventual success of the operation, the transition team was advised of the economics behind the planned reduction-in-force, citing the projected staffing figures in the financial plan, and the critical importance of effectuating layoffs within a matter of days.

Regarding hourly employees, Murray asked the transition team to retain the best employees, based on their objective work records. Although he added that attendance data, safety records, discipline histories, versatility, years-of-service and an employee's ability to help the company were relevant considerations, he left it to transition team members to develop the precise criteria for assessing their performance. Team members were not instructed to consider union affiliations or preferences, nor was there any discussion at the meeting, or any subsequent meeting, pertaining to unions, the United Mine Workers or the mine's recent organizing campaign and election.

Later that same morning (June 17), after arriving at the mine, the transition team convened in the staging area of the mine's administration building. At approximately 6:30 a.m., before the morning crew began its shift, the new owners conducted the first of a series of meetings with the workforce. At this meeting, and at subsequent meetings that day with other crews, the future of the Galatia operation was discussed, including mining locations, safety, scheduling, fostering communication with management, various customer issues, upgrading mine infrastructure (e.g., improving the mine's belt system, preparation plant and other raw coal handling facilities) and the acquisition of coal reserves. It was also announced that although most existing employee programs would remain in place under Respondent's management, Respondent would eliminate the Kerr-McGee antinepotism policy, restructure management and downsize the salaried and hourly staff. In particular, regarding hourly layoffs, Murray apprized the work force, as he had informed the transition team, that all employment decisions would be performance based.

Over the next six days, beginning on June 18, the transition team worked virtually around the clock to accomplish their assigned tasks, including preparation for the imminent reduction-in-force. Given the economic pressures to reduce the workforce as articulated in the financial problems it was determined that termination decisions had to be made within a matter of days. On June 23, only 6 days after arriving in Galatia, the team finalized its determinations and notified approximately 86 hourly employees of their termination. The salaried reductions of approximately 160 employees ("2 salaried for every

hourly person, because they were top heavy in management") were accomplished within the same timeframe.

Shortly before the formal closing, Gentry asked a senior officer with Kerr-McGee in Oklahoma to provide a current employee roster and attendance records for Galatia employees in preparation for the reduction in force contemplated by the financial analysis. The employee roster information was provided to Gentry and the data was transposed into an Excel worksheet format, detailing each employee's name, job title, pay rate, hire date and birth date. Prior to the transition team's arrival at the mine on June 17, the mine's personnel and payroll departments gathered various personnel data regarding work-days missed, disciplinary letters received, letter-grade performance ratings created by Kerr-McGee managers prior to the sale, and a document listing the number of absence occurrences for hourly employees. The performance ratings filled out some months before the sale to Respondent were not used as it turned out. As noted above Respondent relied on performance evaluations filled out just after Respondent took over the mine. Other than providing this data to the transition team, current or former Kerr-McGee management did not participate in the evaluation of employees or in the selection of employees for layoffs, and at no time did Kerr-McGee ever provide Respondent with any information, either written or oral, regarding the union or non-union preferences of any of its employees.

As personnel data was gathered, it was provided to two members of the transition team, Eric Anderson, an operations engineer for Maple Creek Mining in Bentlyville, Pennsylvania, and Clyde Borrell, a senior projects engineer for the Ohio Valley Coal Company in Aladonia, Ohio, who were initially charged with assimilating the material. I credit the testimony of Anderson and Borrell. To accomplish this task, Anderson dictated the numbers to Borrell, who entered them on his laptop computer into an evolving spreadsheet. Borrell had been selected for a central administrative role in the hourly reduction-in-force selection process because of his expertise in spreadsheet programs and statistics, including data entry. Given the volume of employees under consideration, it was clear from the earliest stages of the transition process that large amounts of information would be analyzed. As the process continued and new information was provided to Borrell, he added the data to his laptop computer's data base, eventually generating a comprehensive spreadsheet which was used as the basis for the reduction selections.

Given their goal of retaining the best employees, it was necessary to determine the precise criteria by which the top performers could most accurately and most expeditiously be identified. To this end, prior to settling on three primary factors, the suitability of numerous performance-related criteria were considered. Ultimately, several criteria were excluded as too subjective or ambiguous, and —because of the short time period involved— impracticable. Specifically, safety infractions noted in employees' records were not considered as an appropriate yardstick for layoffs, unless the infractions involved insubordination, since underlying information regarding safety-related incidents would be difficult to gather. It was also concluded that it would be arbitrary, for comparison purposes, to assign concrete numbers to different types and degrees of safety infractions. Length-of-service was also rejected as a

fractions. Length-of-service was also rejected as a factor, since newer employees in Respondent's nonlegally objectionable judgment were not per se less valuable than employees with longer work histories. Additionally, the employee ratings contained in the Kerr-McGee hourly employee performance evaluations —95 percent of which rated employees "Meets" expectations or higher — were too uniformly positive and superficial to be of use (Of the 443 employees who received Kerr McGee letter ratings, 308 (or 69.5%) received "Meets" ratings and 107 (or 24.1%) received "Exceeds" ratings). The relative homogeneity of these ratings did not meaningfully differentiate one employee from another, thus depriving them of evaluative utility in the process.

In the end, three criteria were selected upon which to base individual termination decisions: (1) the average number of yearly absence occurrences for each employee (over a 3.5 year period); (2) the total number of disciplinary letters on file for each employee (for the past 3.5 years); and (3) contemporaneous performance ratings completed by foremen, supervisors and management during the days immediately preceding the layoffs. These factors were considered to be objective and quantifiable, and amendable to a numerical, systematic analysis —an important consideration given the number of terminations to be effectuated within a very short time period. As the process moved forward, the quantitative numbers derived from these three factors dictated the termination decisions.

With respect to the first factor, by considering absence occurrences rather than straight absences, Respondent wanted to distinguish employees who were sporadically absent — whose frequent absences disrupted the workforce and created repeated scheduling problems —from those employees who may have incurred numerous absences as the result of infrequent but protracted illnesses or injuries. Thus, based on documentation listing the yearly occurrence figures for each mine employee, the transition team members generated an Occurrence Rate, which it used as a key numerical benchmark for determining who would be terminated. This Occurrence Rate was determined by dividing the number of occurrences by 3.5, or a lesser number if the employee in question had not been employed by Kerr McGee for at least 3.5 years.

The second factor relied upon was supervisor evaluations, or foreman ratings. To gather these ratings, transition team members instructed foremen and supervisors to evaluate employees with whom they had directly worked and to evaluate other employees if they had knowledge of the performance of such employees. They were told to base their evaluations of the employees' work records, to rate the employees using a "1" to "10" scale ("10" being the most favorable) and to return the completed ratings within two days —by June 21.

As the foremen and supervisors completed their evaluations, they delivered them to Anderson and Borrell. Anderson reviewed and recorded the numerical ratings and, where necessary, converted reviewers' narrative comments into numerical "1" to "10" ratings when the reviewers failed to do so. Where a reviewer submitted written comments instead of numerical ratings, it was Anderson's responsibility to critically review the comments and convert the reviews into numerical ratings. In accordance with explicit instructions from Gentry, Anderson

based all of his numerical ratings solely on work-related comments, and he ignored any remarks unrelated to actual work performance. In the six isolated cases (of the more than 1800 evaluations) where supervisors' comments specifically alluded to an employee's union preference, Anderson ignored such comments when formulating his ratings.

As Anderson reviewed the supervisor and foreman evaluations, he compiled a table with corresponding numerical ratings adjacent to each employee's name. Depending upon the number of foremen who had evaluated a given employee, Anderson tabulated, with a red-inked pen, one to twelve individual ratings for each employee. Since Anderson knew neither the foremen completing the evaluations nor the employees being evaluated, and because he did not have sufficient time to contact the evaluators to request follow-up information or investigate the specific criteria used in the foremen's comments, Anderson's task was limited to interpreting and recording the evaluations as written. After Anderson had recorded all of the individual foreman scores on the tabulation sheet, he read them to Borrell, who entered these figures into the master spreadsheet on his laptop computer. Using an averaging function in the spreadsheet program, Borrell thereafter generated an average foreman rating for each employee.

The third factor, which was reflected in a handwritten tally on Anderson's tabulation sheet (GC Exh. 5) under the heading "Discipline," was the number of discipline letters in each employee's Kerr-McGee file. This data was also entered into the spreadsheet by Borrell. In some cases, asterisks were noted next to employees' names on the tabulation sheet to highlight disciplinary letters for egregious conduct, such as insubordination or safety violations where an employee was put at risk of bodily injury.

After all of the data pertaining to employee occurrences, discipline and foremen ratings was synthesized in the spreadsheet by Anderson and Borrell, certain threshold determinations were made regarding unacceptable and "gray-area" scores in each category. With respect to occurrences, an Occurrence Rate of "3.0" was deemed generally unacceptable, thus placing an employee with such a rate in the category of likely terminations. Those employees whose Occurrence Rates were slightly above or below "3.0" were considered to be in the gray area, and, depending on the two other key criteria —Foreman Rating and prior disciplinary letters— may or may not have been retained.

Regarding the foreman evaluations, each employee's numerical foreman rating was determined by dividing his or her total number of individual rating points (as recorded in Anderson's tabulation sheet (GC Exh. 5), by the number of foreman who evaluated that employee. In general, a foreman rating below five was considered "less than desirable." Here too, however, there existed a range —slightly above or below "5.0"— where, depending on the employee's two other rankings, the employee could have been selected for either termination or retention.

With respect to disciplinary letters, in most cases the presence of such a letter in an employee's file resulted in an unfavorable view towards the employee's continued employment, especially if the employee's Occurrence Rate or Foreman Rating was in the gray area. Absent very favorable ratings in the

other factors, the presence of more than one disciplinary letter resulted in the employee's termination. In a few select instances, the reason for the discipline (i.e., the severity of the employee's offense or insubordination) was considered, and in such cases, the discipline letter tabulations were cross-referenced to ascertain whether the particular employee's discipline letter was severe, as indicated by an asterisk.

Two groups of employees were exempted from the review process: (1) employees on a workers' compensation leave of absence, and (2) employees in the Mine's Preparation Plant ("Prep Plant"). Employees in these categories were all retained, regardless of the individual rankings. With respect to Prep Plant operators, they were excluded from the spreadsheet (and thus retained) due to the highly technical nature of their work and the importance of running the Plant as efficiently as possible during this critical period. During the transition process, at the request of mine supervision, four additional employees were removed from surface or underground jobs and reassigned to the Prep Plant because according to Clyde Borrell the "[P]lant was way behind in production." Employees who were on Workers' Compensation leaves also were exempted from the termination process. In addition, for purposes of affirmative action, in several instances individual employees e.g., Gary Young (multiple sclerosis), Charles Duie (Black) and Barbara Strickler (woman), within certain protected categories (e.g., African Americans, women, disabled individuals), whose scores would otherwise warrant possible terminations, were retained.

Based on the team's analysis of Occurrence Rates, Foreman Ratings and Discipline Letters, 86 hourly employees were selected for termination. While some were selected because their numerical score in one of these categories was below the acceptable parameters set by the transition team, the majority was selected because their scores in more than one category, either independently or taken together, warranted their termination.

The following 14 alleged discriminatees were selected for termination because their scores in more than one of the dispositive categories (i.e., Occurrence Rate, Foreman Rating and Discipline Letters) —either independently or taken together—warranted their termination:

Name	Occurrence Rating	Foreman Rating	Discipline Letters
1. David Amberger	3.14	6.0*	at least one
2. Michael Brogan	4.57	2.7	"serious discipline letter"
3. Benjamin Cain	2.69	6.31	
4. Lawrence Carmon	2.86	5.0	--
5. George Chick		3.43	2.31
6. Tony Crisp	3.43	2.4	"at least one"
7. Mark Donoghue	2.86	6.8	"at least one"
8. Dennis Lampert	3.71	5.4	--
9. Allan Minton		3.71	4.3
10. Bernard Reynolds	3.43	2.7	--
11. Timothy Russell	3.14	3.8	"at least one"
12. Thomas Simpson	4.4	4.4	"at least one"

13. William Slankard	0.0	3.5	"severe discipline letter"
14. Edward Williams	3.25	2.6	--

In addition, 21 other hourly employees, who were not discriminatees were layoff for this reason.

The following 14 alleged discriminatees were selected for termination because of Foreman Ratings that were either in the "unacceptable" range or in the lower range of the gray area:

Name	Foreman Rating
1. James Barton	1.0
2. Wayne Beal	2.0
3. Ernest Harvell	2.0
4. William Bish	"considerably below 5"
5. Bill Bishop	2.6
6. Larry Brown	"considerably below 5"
7. Larry S. Brown	1.0
8. Bruce Clarry	4.0
9. Barbara Crabtree	3.5
10. Marty Gayer	4.0
11. Dolly Monte	2.0
12. Michael Vosbein	2.6
13. David White	1.8
14. George Yarbrough	1.6

In addition, 19 other employees, who were not discriminatees, were layoff for this reason.

One alleged discriminatee, Lance Damm, was terminated because he had four discipline letters in his Kerr-McGee file.

Finally, the following four alleged discriminatees were selected for termination due to Occurrence Rates that were unacceptable or in the gray area:

Name	Occurrence Rate
1. Mark Anderton	3.14
2. Larry Thuillez	2.57
3. Kenneth Wallace	6.0
4. Charles Wright	2.86

In addition, 10 other employees, who were not discriminatees, were laid off for this reason.

#### F. Further Discussion

It is clear from the record that after Respondent took control of the mine on a number of occasions at various awareness meetings between management and employees, CEO Robert E. Murray told employees that they had made the right decision in voting against union representation when the mine was owned by Kerr-McGee.

It is also clear that when Murray was asked at awareness meetings between management and employees if he would have bought the mine if the employees had voted to be represented by a union Murray, using his fingers, informed employ-

ees that the chances of him buying the mine if it were union were "zero."

In January 1999, more than 6 months after the layoff, it became apparent that Respondent needed to hire some additional miners to work on weekends. They were referred to as "week-end warriors." At a series of awareness meetings in early January 1999 CEO Robert E. Murray spoke about the need to hire these additional mines.

It is alleged in the complaint that Murray "informed employees that Respondent would not hire employees who supported the union" and that Murray "informed employees that it had terminated employees because of their support for the union and now that it was rehiring it would not hire employees who supported the union."

In support of these allegations, which, of course, if true would throw light on Respondent's motivation in laying off certain personnel in June 1998, the General Counsel offered four witnesses, Charles Jacoby, Jan Consi, Debra Mikalauskas, and Marty Yosanovich.

All four had survived the layoff in June. All four testified about Murray's statements at the January 1999 awareness meetings. The same awareness meeting would be held for different elements of Respondent's workforce.

Charles Jacoby, who worked on A crew, testified that Murray stated that he wanted to hire young "non-union oriented" people.

Jan Consi, a member of D Crew, who voluntarily resigned from Respondent's employ in March 1999, testified that at the meeting she attended Murray said that Respondent needed to hire young, experienced "non-union oriented employees."

Debra Mikalauskas, a member of C crew, also testified that Murray in the January 1999 awareness meeting she attended said he wanted to hire experienced "non-union oriented" workers.

Lastly, Marty Yosanovich, a member of C crew, testified that Murray wanted experienced people but he did not want to hire "union people." In February 1999 Yosanovich got into a dispute with management and was asked to quit or he would be fired. Yosanovich quit.

Interestingly enough Yosanovich by his own admission was antiunion during the campaign. Both Consi and Mikalauskas were prounion during the campaign, and in their opinion, management knew they were prounion and both survived the June 1998 layoff. However, they are both women and Respondent admits it discriminated in favor of women. In addition, Dwight Pray, who did not testify, was active on behalf of the Union and one of two union observers at the election and he also survived the layoff. Again, Respondent admits it discriminated in favor of minorities and Pray is an African-American.

I found Jacoby, Consi, Mikalauskas, and Yosanovich to be credible witnesses and I have no doubt they told what they believed to be the truth. However, Respondent called a large number of witnesses all of whom also appeared credible to testify that Murray did not say what Jacoby, Consi, Mikalauskas, and Yosanovich testified he said about wanting to hire "non-union oriented" workers or not wanting to hire "union people." The witnesses who contradict the General Counsel's four witnesses were Michael Jeter, Dan Inabit, Lester

Burklow, David Dixon, Francis Hammer, Christopher Barter, Kenneth Hoercher, David Sneed, Dwight Jackson, Travis Tate, and Rodney Powell.

Dudley Williams credibly testified that he recommended two people to be hired after the January 1999 awareness meetings and both were hired and both were union men.

In February 1999 Respondent hired approximately 70 employees and 70 percent of those hired had a union background.

A number of Respondent's witnesses who testified that Murray never said he wanted to hire "nonunion oriented" employees or "nonunion" employees readily admitted that Murray said things that were antiunion, e.g., Francis Hammer testified that Murray had said he was glad Respondent was non-union, Christopher Barter testified Murray said he was not in favor of the union, David Sneed testified that Murray said he would prefer the mine to be union free and Dwight Jackson and Travis Tate testified that Murray said he would not have bought the mine if it had gone union.

While a fact finder may credit one witness over several witnesses who contradict that witness I find in light of all the testimony that the General Counsel's four witnesses are mistaken about what Murray said in the January 1999 awareness meetings. The only question is the reliability of their testimony. The testimony of the witnesses for the Respondent on this issue, i.e., the 11 referred to above plus Murray and Vice President for Human Resources Bruce Hill cause me to conclude that the General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by Murray's statements at the January 1999 awareness meetings.

The testimony from Respondent's highest management, i.e., CEO Robert E. Murray, was that foremen and others who filled out evaluations on employees were told that they were not to consider the union affiliation of employees they were evaluating. A large number of such persons testified they did not consider union affiliation or sentiment in the evaluations they furnished and were told not to consider union affiliation in making their evaluations.

They were as follows: Charles Bowlin, Donald Eroh, Doug Harver, Roy Jones, John Dunn, Calvin Melvin, Dan Ramsey, William Penrod, David Strunk, Jimmy Wilson, Steve Roye, Vern Brotherton, Dave Columbo, Duane Lampert, Vernon Dunn, James Allen, Jerry Whitehead, Daryl Tolbert, Doug Huie, Robert Conn, William Devine, Denzil Hughes, Bruce Hill, and Bob Dupuis.

William Penrod, who is noted above, no longer worked for Respondent when he testified before me but his current employer has Respondent as a customer. Steve Roye and William Devine, also noted above, no longer work for Respondent. Denzil Hughes did not work for Respondent when he testified before me but had applied for a job with Respondent.

The principal issue in this case is not whether Respondent is nice or not but whether Respondent violated the Act in selecting the discriminatees in this case for layoff because of their union affiliation or their support for the Union and in order to discourage employees from engaging in these activities.

A large number of employees were laid off, i.e., 160 salaried and 86 hourly employees. Statistically we can assume that



many had families, some had disabled children, and some had fought in battle for their country. Life can indeed be tough.

It is not alleged that Respondent did anything unlawful in effectuating the layoffs. The only question is whether or not the employees selected for lay off were selected in an unlawful manner. In other words the same number of employees with the same statistical profile were going to be laid off whether Respondent selected the employees to be laid off in a lawful or an unlawful manner.

I find that Respondent applied neutral objective criteria in selecting employees for lay off and did not violate the Act when it laid off the 33 alleged discriminatees in this case. In reaching this conclusion I rely on the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 US 989 (1982). I find Respondent would have selected for lay off the alleged discriminatees in this case even if they had not been active in the union or supportive of the union.

#### CONCLUSIONS OF LAW

1. Respondent, The American Coal Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The complaint is dismissed in its entirety.

---

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.